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Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MOTHER AND UNBORN BABY CARE OF NORTH TEXAS, INC., AND CHARLES J. PELLETIER, II,

Petitioners,

v.

THE STATE OF TEXAS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT OF TEXAS

J. SHELBY SHARPE
2401 Texas American Bank Building
500 Throckmorton Street
Fort Worth, Texas 76102
(817) 338-4900

COUNSEL OF RECORD

QUESTIONS PRESENTED

1. Whether speech and advertisements of an individual or group who is supported by donations and receive nothing of value, directly or indirectly, for providing information are protected by the First Amendment from state statutes regulating trade and commerce?

2. Whether fair warning as required by the Fourteenth Amendment Due Process clause is given that state statutes regulating trade and commerce also apply to individuals who are supported by donations and receive nothing of value, directly or indirectly, for providing information?

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v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT OF TEXAS

Mother and Unborn Baby Care of North Texas, Inc. and Charles J. Pelletier, II, Petitioners, respectfully petition for a writ of certiorari to review the judgment and opinions of the Texas Court of Appeals for the Second Appellate District.

OPINIONS BELOW

The majority opinion of the Court of Appeals for the Second Appellate District of Texas is reported at 749 S.W. 2d 533 and the dissenting opinion is reported at 749 S.W. 2d 544 and are reprinted in the Appendix, p. 2a, *infra*.

JURISDICTION

The judgment of the Texas Court of Appeals was entered on March 30, 1988. It is reprinted in the Appendix, p. 20a, *infra*. The court's order denying rehearing was entered on May 11, 1988, and is reprinted in the Appendix, p. 21a, *infra*. An application for writ of error was timely filed with the Supreme Court of Texas and was denied by order dated November 16, 1988. A copy of the notice from the clerk's office of that order is found in the Appendix, p. 22a, *infra*. The Supreme Court of Texas overruled Petitioners' motion for rehearing on January 4, 1989, and a copy of the notice from the clerk's office is found in the Appendix, p. 23a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U. S. Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Deceptive Trade Practices-Consumer Protection Act, Sec. 17.45 (1), Sec. 17.45 (2), 17.45 (6); Texas Business and Commerce Code, Sec. 17.45 (1), 17.45 (2), 17.45 (6), Vernon's Tex. Ann. Codes.

Sec. 17.45. Definitions

As used in this subchapter:

(1) "Goods" means tangible chattels or real property purchased or leased for use.

(2) "Services" means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.

(6) "Trade" and "commerce" means the advertising, offering for sale, sale, lease, or distribution of any good or service, or any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state.

Texas Deceptive Trade Practices-Consumer Protection Act. Sec. 17.46(a); Texas Business and Commerce Code, Sec. 17.46(a), Vernon's Tex. Ann. Codes.

False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division under Sections 17.47, 17.58, 17.60 and 17.61 of this code.

STATEMENT OF THE CASE

Mother and Unborn Baby Care of North Texas, Inc., hereinafter referred to as "Mother", is a Texas non-profit, charitable corporation holding a determination letter from the Internal Revenue Service that contributions made to it are entitled to be deducted as charitable contributions (S.F. 63, 182). It operates a problem

pregnancy center which has never asked for anything of value for the information and services it provides (S.F. 561, 599). It has nothing to sell and never has (S.F. 561). Its operations, which are made possible solely bycontributions and donations from individuals who desire to help women with problem pregnancies, are carried out by volunteers who receive no compensation for their labors (S.F. 557, 561, 562,

Charles J. Pelletier, II, hereinafter referred to as "Pelletier", was one of three incorporators of Mother (S.F. 55). He is a member of the board of directors by election of the membership and is president by election of the board of directors (S.F. 547-548). Pelletier also serves as director of the center carrying out the policies of the board of directors (S.F. 60, 559). He has never exercised power beyond the particular position in which he was functioning and corporate formalities have always been followed (S.F. 555-556).

Mother's problem pregnancy center advertises in several editions of local Yellow Pages (S.F. 21-23, 211, 252-253, 455, 494). Every advertisement offers free services, consisting of a walk-in pregnancy test with results in thirty (30) minutes, personalized counseling and abortion information, with all services kept confidential (Exhibits Index, Plaintiff's Exhibit 1, 2, 3, 381). When the center receives a call, the caller is urged to come in for the free pregnancy test and for free counseling (S.F. 102). The primary objective is to have the caller receive complete information at the center and not partial information over the phone (S.F. 102-103). Half of those who come in to the center are not interested in an abortion while the rest are (S.F. 100). The volunteers answering the phones at the center are instructed never to lie to a caller because the person coming to the center will not know if the information received there is the truth (S.F. 583-584). They are told that they do not have to answer any question they do not wish to answer (S.F. 101).

These proceedings were instituted against Mother and Pelletier by the State under the Texas Deceptive Trade Practices-Consumer Protection Act, hereinafter sometimes referred to as "the DTPA", after several women complained they were deceived into believing

the center was an abortion clinic and only went there because of this belief (S.F. 5-6, 198-199, 218-219, 242-243; Tr. 169-182). The Act declares it applies only to those engaged "in the conduct of any trade or commerce." Section 17.46(a), Texas Business and Commerce Code.

Mother and Pelletier raised as defenses in their trial pleadings that they were not engaged in any trade or commerce and to apply the DTPA against them would violate their freedoms protected by the First Amendment and Fourteenth Amendment Due Process Clause to the Constitution of the United States (Tr. 186-204).

The evidence at the trial was undisputed that the center had nothing to sell and gave away for free its information and services (S.F. 561, 599). There was no evidence Mother was engaged in the conduct of any trade of commerce. In fact, the evidence was that it was not so engaged (S.F. 561, 599). Further, all the witnesses who testified about the Yellow Pages advertisements conceded that all of the statements in them were true (S.F. 21-23, 211, 226, 252-253, 455, 494).

When the State rested its case after conceding that Mother and Pelletier had never sold anything, Mother and Pelletier unsuccessfully moved for an instructed verdict on the basis that there was no evidence that they had violated the DTPA (S.F. 385-387). This motion was unsuccessfully reurged when the State closed (S.F. 632-633).

Mother and Pelletier timely and properly objected to the court's charge, on the basis, first, that there was no evidence that they were engaged in the conduct of any trade or commerce which was essential to establish a violation of the DTPA and, second, that to enter a judgment upon an adverse jury verdict against them would violate the First Amendment and Fourteenth Amendment Due Process Clause to the Constitution of the United States (S.F. 640-643). The court overruled these objections (S.F. 644). Following a jury verdict in favor of the State, Mother and Pelletier timely filed motions for judgment *non obstante veredic*to (Tr. 239-246). The court overruled these motions and entered judgment on the verdict and upon findings the court made as a matter of law (Tr 260-266).

The judgment ordered Mother and Pelletier to inform all persons contacting the center that is was not an abortion clinic and no referrals to abortion clinics would be made (Tr. 260-266). Also, all advertisements were required to contain a disclosure in ten-point bold type or no less than the smallest size type in the advertisement that the center was "Not an abortion clinic. No abortions, abortion referrals or medical services provided" (S.F. 264-265). Finally, the judgment assessed civil penalties against Mother and Pelletier of $39,000 and attorneys fees of $49,025 (Tr 265).

The district court judgment was appealed to the Court of Appeals for the Second Supreme Judicial District of Texas. Points of Error One through Five in Mother's and Pelletier's Brief of Appellants asserted that the evidence established as a matter of law that they were not engaged in the conduct of any trade or commerce in violation of the DTPA and that the judgment of the court below violated their freedoms protected by the First Amendment and Fourteenth Amendment Due Process Clause to the Constitution of the United States. The brief cited to the court this Court's decision in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* and placed the full text of the slip opinion, which had just come out, as an appendix to the brief. The court overruled these points of error and refused to follow the *Federal Election Commission* decision. 749 S.W.2d 540, 541, 542. The dissenting opinion declared that the DTPA did not apply to Mother and Pelletier because their activities were not commercial in nature but simply a "way to get their pro-life messages to women who were seeking abortions." 749 S.W.2d 544-545. These points of error were preserved in Points of Error 2, 3, 4, 10, 11, 12, 13 and 14 in their motion for rehearing. The motion for rehearing was overruled on May 11, 1988. (Appendix, p. 21a, *infra.*)

The case was appealed to the Supreme Court of Texas through the filing of an application for writ of error which contained Points of Error One through Four preserving these defenses. Following the denial of the application, these defenses were preserved in Points of Error One through Four in their motion for rehearing.

REASON FOR GRANTING THE WRIT

Abortion is one of the most pressing and crucial moral, social, political, legal and theological issues of our day. Each side of this issue seeks to communicate its viewpoint to as many pregnant women as possible. The decision of the courts below effectively cuts off the communication of information on this issue to a large group of women through the application of a commercial regulation statute to people who are not engaged "in the conduct of any trade or commerce" as is expressly required by Section 17.46(a) of the DTPA.

The legislature obviously never intended the DTPA to be used to stifle or restrict public debate or protests against any aspect of trade and commerce. In fact, the DTPA expressly exempts newspapers, magazines, telephone directories, broadcast stations and billboards. Section 17.49, Texas Business and Commerce Code. Therefore, it is irrational and inconceivable that the legislature having exempted these entities, which sell or lease goods for economic gain, would intend for the Act to be applied to charitable volunteers who give away information and services for free.

On many other occasions, unsuccessful efforts have been made to stifle or restrict speech that was unpopular, disturbing or nonconforming to segments of our society. Consider, for example, the facts in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (provocative religious speech in a Catholic neighborhood), or *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969)(Vietnam protest in public school setting), or *Cohen v. California*, 43 U.S. 15 (1971) (obscene language sewn on a jacket worn in a public courthouse) or *Smith v. Georgia*, 415 U.S. 566 (1974) (American flag sewn on seat of trousers). This is another such attempt.

Numerous suits of this kind have been filed across the country against anti-abortion clinics to prevent them from being able to communicate information on abortion to these pregnant women. The use of these statutes is clearly to control the method of communication. The judgment in the trial court makes this clear by declaring that

nothing in it shall prohibit the advocacy of "beliefs with respect to abortion *so long as their* [Petitioners] *conduct* toward consumers is not false, misleading or deceptive"[1] (Tr. 265).

The interpretation being placed on these commercial statutes brings every church, synagogue and like religious institution under them. The opinion of the Texas Court of Appeals states that distributing "pamphlets" and providing "pregnancy testing, anti-abortion counseling, arrangements of financial assistance, aid in adoption procedures and help in obtaining legal aid" even at no cost, brought Mother and Pelletier within the scope of the DTPA. 749 S.W.2d 538. It was "immaterial" to the court whether Petitioners had anything to sell. 749 S.W.2d 538. Churches and other religious bodies advertise their services, distribute pamphlets, provide financial assistance, furnish counseling and give away goods. All of these activities are conduct the Texas court held invokes the DTPA.

The order of the language of Section 17.46(a) has contributed to some degree to the misanalysis by the lower courts. Section 17.46(a) should read,

> In the course of any trade or commerce, false misleading or deceptive acts or practices are hereby declared unlawful and are subject to action by the consumer protection division under Sections 17.47, 17.58, 17.60 and 17.61 of this code.

Thus, the threshold issue is whether the individual is engaged in a trade or commerce. Until that issue is answered affirmatively, you never get to the second issue on the act or practice being false, misleading or deceptive. The lower courts made a determination of deceptive conduct and used this alone to find that Mother and Pelletier were engaged in trade and commerce. Unless these statutes are properly interpreted, then they can and will be applied to any other person or group engaged in a public debate on issues opposed to trade and commerce for strongly held convictions, such as apartheid in South Africa.

But, probably the biggest obstacle to a proper analysis of the Act

[1] Emphasis mine throughout unless otherwise noted.

was that denial of the relief sought by the State would give the appearance of sanctioning wrong conduct. No one, and especially a court, wants to take action that appears to approve of wrong conduct. However, in a truly free society, speech, which is non defamatory, non obscene and does not economically benefit the speaker, directly or indirectly, must remain free of any constraint.

This Court's decision in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), controls this case along with the other cases pending across the country and prohibits the DTPA and similar commercial statutes from being applied to the speech and advertisements of individuals who are not engaged in trade or commerce. Further, fair warning is not given to such individuals as is required by the Fourteenth Amendment Due Process Clause.

I. The decision of the Texas Court of Appeals, applying a trade and commercial regulation statute to speech and advertisements of individuals who are supported by donations and receive nothing of value, directly or indirectly, for information provided, conflicts with this Court's decision in *Federal Election Commission v. Citizens for Life, Inc.*

In *Federal Election Commission v. Citizens for Life, Inc. v. Massachusetts Citizens for Life, Inc.*, hereinafter referred to a "MCFL", it was noted that MCFL was a non-profit corporation. 479 U.S. 241. MCFL'S resources came from donations and various fund raising activities to support its pro-life activities. 479 U.S. 242. It primarily disseminated political ideas, did not amass capital and did not exist for economic gain. 479 U.S. 264. All of these things are true of Mother except it does not disseminate political ideas, just free information and services.

This Court held that the Federal Election Campaign Act as applied to MCFL violated its freedom of speech protected by the First Amendment. 479 U.S. 263. The Court reasoned that the Act was designed to prevent traditional corporations organized for economic gain from unfairly deploying their wealth for political purposes and MCFL was not such an entity. 479 U.S. 263-264.

This is precisely true of the Texas Deceptive Trade Practices-Consumer Protection Act as applied to Mother and Pelletier. The DTPA was designed to regulate the conduct of those who are engaged in traditional activities of receiving something of value in exchange for a good or service. The Texas courts have inappropriately applied the Act just as occurred with the Federal Election Campaign Act. If it is inappropriate to apply the DPTA to churches which often receive money from those attending their services, sell sermon tapes and other items and have pamphlets to pass out, then Mother and Pelletier should not be covered because of their distribution of informtion and services for free.

As Justice Brennan wrote at the conclusion of the majority opinion in *Massachusetts Citizens for Life, Inc.*, to-wit:

> Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 82 L.Ed. 288, 58 S.Ct. 149 (1937). Our pursuit of other governmental ends, however, may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. *For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction. Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation.* In enacting the provision at issue in this case, Congress has chosen too blunt an instrument for such a delicate task.

479 U.S. 264-265 (1986). If the DTPA applies to this cause, the Texas legislature "has chosen too blunt an instrument for such a delicate task." The decision of the Texas courts in this cause is considerably more than "a modest diminution of speech."

Thus, First Amendment expressions against trade and commercial activities which are voiced by those who are not in trade or

commerce are in great jeopardy if the Court does not require the courts of this land to abide by its decision in *Massachusetts Citizens for Life, Inc.* Accordingly, a writ of certiorari should issue in this case as this Court has done in the past when a subsequent decision of a lower court conflicts with a decision of this Court or a proper extension of such a decision. *Hudson v. Louisiana*, 450 U.S. 40, 42-43 (1980).

II. The decision also violates the Fourteenth Amendment Due Process Clause because it applies a trade and commercial regulation statute to people who had no fair warning their conduct was considered to be in trade or commerce.

To apply the Texas Deceptive Trade Practices Act, or any similar act, to communications which do not occur in the conduct of what people of ordinary intelligence would consider to be trade or commerce, renders such an act void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment. This Court has long held that a non-criminal statute is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment if the language of the statute does not convey a sufficiently definite warning of the proscribed conduct when measured by common understanding and practice. *Jordon v. DeGeorge*, 341 U.S. 223 (1951). See also *Grayned v. City of Rockford*, 408 U.S. 104 (1972) and *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

In First Amendment freedom cases, the void for vagueness standard is always unusually strict. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982). This Court wrote in the *Hoffman Estates* case that "[i]f. . . the law interferes with the right of free speech association, a more stringent vagueness test should apply." 455 U.S. 499.

The reasons for requiring punitive statutes such as the Texas Deceptive Trade Practices-Consumer Protection Act to be clear in their prohibitions is well stated in *Grayned v. City of Rockford*:

> It is a basic principle of due process that an enactment is void for vagueness *if its prohibitions are not clearly defined.* Vague

> laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, *we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly*. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, a law must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

408 U.S. 108-109.

The State's attack on Mother and Pelletier is directed solely to the method used to reach a group of people with information. This unequivocally and clearly is an attempt to regulate speech.

The Act in question is not vague on its face. The constitutional vagueness problem is created by the State's attempt to apply the Act to conduct outside of its scope. It was long ago settled by this Court that it will stop an unconstitutional application of a law which is not unconstitutional on its face. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

A statute which is vague on its face may give an individual at least a hint that the conduct might be subject to sanctions. However, an individual does not even have a hint that sanctions may occur when the vagueness is created by applying a statute whose language does not even suggest that conduct falls within its scope. This latter situation is a far more insidious constitutional problem and is the problem in this case.

CONCLUSION

The application of a commercial regulation statute to those who are not engaged in commercial activity is a hideous violation of the First Amendment and Fourteenth Amendment Due Process Clause threatening all individuals and organizations who speak out against commercial activity to which they are opposed. Justice Brennan prophetically described the significance of this threat to our nation in

prophetically described the significance of this threat to our nation in the conclusion of the *Massachusetts Citizens for Life, Inc.* opinion, to-wit:

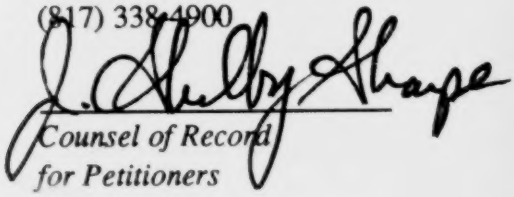
> Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom". *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

479 U.S. 264 (1986).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

J. Shelby Sharpe
2401 Texas American Bank Building
500 Throckmorton Street
Fort Worth, Texas 76102
(817) 338-4900



Counsel of Record
for Petitioners

APPENDIX

Opinion of the Appellate Court
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Judgment of the Appellate Court
for the Second District of Texas 21a

Order of the Appellate Court
for the Second District of Texas 22a

Order of the Supreme Court of Texas 23a

Order of the Supreme Court of Texas 24a

No. 2-86-266-CV

IN THE COURT OF APPEALS
FOR THE SECOND APPELLATE
DISTRICT OF TEXAS

MOTHER AND UNBORN BABY CARE
OF NORTH TEXAS, INC., AND
CHARLES J. PELLETIER, II

Appellants

vs.

THE STATE OF TEXAS

Appellee

FROM THE 67TH DISTRICT COURT OF TARRANT

OPINION

Appellants, Mother & Unborn Baby Care of North Texas, Inc. ("Center") and Charles J. Pelletier, II ("Pelletier"), brings this appeal from a judgment enjoining certain conduct found in violation of the Deceptive Trade Practices - Consumer Protection Act ("DTPA"); the court further mandated disclosure in advertising, assessed civil penalties for violations of the DTPA and further violation of a court-ordered temporary injunction, and awarded attorney's fees to the State. See TEX. BUS. & COM. CODE ANN. secs. 17.41-17.50 (Vernon 1987).

Appellants bring ten points of error interpretation and application of the DTPA; notice; violation of their right to freedom of speech,

press and religion; an inalienable right to disseminate information and, improper exclusion of evidence or, in the alternative, insufficiency of evidence to assess penalties against appellant, Charles Pelletier, II.

The judgment is affirmed.

The present case deals with the propriety of methods of advertising by appellants.

Evidence adduced at trial showed the following approximate sequence of events: a large number of women found appellants' advertisement within the Southwestern Bell Yellow Pages ("Yellow Pages"); believing it to be an abortion clinic, the women contacted the Center requesting an abortion. Through different means, either asking different questions or giving evasive answers, these women were led to believe that the Center was an abortion clinic, and made an appointment. Upon their arrival, the women gave personal medical information to appellants' volunteers by filling out a medical information card. They then gave appellants urine samples to obtain free pregnancy tests, as advertised. Upon being told, both over the phone and in person, the test would take 30 minutes, the women expected to wait for the results. While waiting they were led into another room by themselves whereupon they were shown a slide show and a videotape showing graphic pictures pertaining to abortion procedures. It was generally not until the slide/video presentation was shown that the women began to suspect they were not in an abortion clinic. After the presentations, counselors including Pelletier came into the room to attempt to persuade the women against having an abortion. This was later followed up by notes and phone calls from the Center's personnel.

Appellants advertised in the Yellow Pages under the headings "Abortion Information & Services," and "Clinics - Medical." Appellants are pro-life oriented. There is contradictory evidence as to whether appellants attempted to deceive the telephone company regarding whether they actually performed abortions. In 1986, the Yellow Pages refused to allow appellants to further advertise under the above two headings, and the listing was moved to "Abortion

Alternatives"; there is conflicting testimony pertaining to the placement of the 1986 advertisement which actually appears under two columns of "Abortion Services," and is twice the size of the previous advertisements. There is extensive evidence concerning a manual from the Pearson Foundation entitled, "How to Start and Operate Your Own Pro-Life Outreach Crisis Pregnancy Center," which is the primary basis of the principles upon which appellants' corporation is founded. There is conflicting evidence as to the evasive methods in which the manual and the appellants promote their purposes by attracting women seeking an abortion into appellants' "clinic"; this includes answering phone calls with evasive answers so as to imply that appellants performed abortions. The manual suggested, and appellants followed, the procedure of incorporating under the name of Mother & Unborn Baby Care of North Texas, Inc., but operated under the name Problem Pregnancy Center, d/b/a/ Pregnancy Problem Center, d/b/a/ Abortion Action Affiliates Problem Pregnancy Center. The corporate name does not appear in the Center's advertisements or on its building. Evidence is contradictory as to whether this was purposefully done to deceive potential clients into coming to the Center seeking an abortion.

Appellants' first point of error attacks the applicability of the DTPA to appellants' conduct. Section 17.46 of the Texas Business and Commerce Code provides the following:

> (a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division under Sections 17.47, 17.58, 17.60, and 17.61 of this code.

TEX. BUS. & COM. CODE ANN. sec. 17.46 (Vernon 1987). Definitions pertinent to appellants; contentions are within section 17.45 of the code:

> (1) "Goods" means tangible chattels or real property purchased or leased for use.
>
> (2) "Services" means work, labor, or service purchased or

leased for use, including services furnished in connection with the sale or repair of goods.

(4) "Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.

(6) "Trade" and "commerce" mean the advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state.

TEX. BUS. & COM. CODE ANN. sec. 17.45 (1), (2), (4), and (6) (Vernon 1987).

Appellants first argue that their conduct does not constitute trade or commerce because they do not actually sell abortions and medical services, and therefore the DTPA does not apply.

Considering appellants' contentions, we first look to the definitions of "trade" and "commerce," which encompasses "advertising, offering for sale... or distribution of any good or service... or thing of value..."TEX. BUS. & COM. CODE ANN. sec. 17.45(6) (Vernon 1987). By Pelletier's own admission, advertising was sought and obtained with Southwestern Bell, the objective of which being to draw in women seeking or considering an abortion. Exhibits of the actual advertising by appellants from 1984 through 1987 are within the record.

Appellants distributed goods in the way of pamphlets. They also distributed services in the way of pregnancy testing, anti-abortion counseling, arrangements of financial assistance, aid in adoption procedures, and help in obtaining legal aid.

Appellants next contend that they do not sell any goods or services, and therefore the DTPA does not apply to their activities. We disagree.

It is immaterial whether appellants provided a service in exchange for money; the statute as a whole supports the conclusion that transfer of valuable consideration is not necessary. *See Martin v. Lou Poliquin Enterprises, Inc.*, 696 S.W.2d 180, 184 (Tex. Civ. App. -- Houston [14th Dist.] 1985, writ ref'd n.r.e.), *over-ruling Bancroft v. Southwestern Bell Te. Co.*, 616 S.W.2d 335 (Tex.Civ. App.-Houston [14th Dist.] 1981, no writ). If in the context of a transaction in goods or services, any person engages in an unconscionable course of action which adversely affects a consumer, that person is subject to liability under the DTPA. *Flenniken v. Longview Bank and Trust Co.*, 661 S.W.2d 705, 707, T(Tex. 1983); TEX. BUS. & COM. CODE ANN. sec. 17.50 (b) (1) Vernon 1987). The term "sale" is merely one of five possible definitions listed under section 17.45(6).

Further, there is no doubt that the women concerned are "consumers" within the definition of section 17.45(4). Each woman, an individual, testified that she was seeking to purchase a service upon which this complaint is based. *See Riverside Nat. Bank v. Lewis*, 603 S.W.2d 169, 174 (Tex. 1980).

Appellants next argue that their activities of disseminating information fall under section 17.49 as an exemption from the DTPA; that provision relates the following:

> (a) Nothing in this subchapter shall apply to the owner of employees of a regularly published newspaper, magazine, or telephone directory, or broadcast station, or billboard, wherein any advertisement in violation of this subchapter is published or disseminated, unless it is established that the owner or employees of the advertising medium have knowledge of the false, deceptive, or misleading acts or practices declared to be unlawful by this subchapter, or had a direct or substantial financial interest in the sale or distribution of the unlawfully advertised good or service. Financial interest as used in this section relates to an expectation which would be the direct result of such advertisement.

TEX. BUS. & COM. CODE ANN. Sec. 17.49(a) (Vernon 1987).

In all interpretations of the Act, the primary objective is to ascertain the legislature's intent. *Woods v. Littleton*, 554S.W.2d 662, 666 (Tex. 1977). To do that we must look to the Act as a whole, and not at its isolated provisions, keeping in mind "the old law, the evil, and the remedy." *Id.* at 665. The legislature itself stated that the Act "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practies, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." TEX. BUS. & COM. CODE ANN. sec. 17.44 (Vernon 1987).

The scope of the Act is delineated in section 17.49, which sets out the exemptions to the DTPA; those exempted encompass certain media owners and employees who publish and disseminate deceptive advertisements of goods and services for third parties.

Appellants are not members of the media, and are disseminating information for themselves. It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. *Eddins-Walcher Butane company v. Calvert*, 156 Tex. 587, 298, S.W.2d 93, 96 (1957). In furtherance of this doctrine, we believe every word excluded from a statute must be presumed to have been excluded for a purpose. Only when necessity requires, will we insert additional words or requirements into a statutory provision, in order to give effect to clear legislature intent. *See Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570, 572, (Tex. 1971). By exempting appellants from the provisions of the Act, we would be lending credence to those whom the legislature intend to be subject to this law. Had the legislature intended for appellants to the exempted from this Act, it could have easily done so by simply drafting an additional exemption into the appropriate provision. *See Cameron v. Terrell & Garrett, Inc.*, 618 S.W2d 535, 540 (Tex. 1981) We find no indication that the legislature intended appellants' argument to be a persuasive one.

Finally, even if appellants were initially exempted, section 17.49(a) withdraws the exemption if "it is established that the owner or

employees of the advertising medium have knowledge of the false, deceptive, or misleading acts or practices declared to be unlawful by this subchapter." TEX. BUS. & COM. CODE ANN. sec. 17.49(a) (Vernon 1987).

Charles Pelletier testified that in 1984 he contacted Mr. Toy Echols, an advertising representative of Southwestern Bell, in order to place an ad in the phone directory. Pelletier initiated the contract with Southwestern Bell, and submitted the advertisement he wanted placed in the Yellow Pages. He further submitted advertisements for 1985-1986 for the Center. Pelletier testified that he specified the headings he wanted the Center to appear under; he was personally responsible for the size of the advertisement, which doubled in the 1986 directory. The reason for the enlargement of the ad in 1986 was Southwestern Bell's refusal to allow appellants to further advertise under Medical Clinics and Abortion Services. We find that appellants had knowledge of the improper advertising.

The jury found fraud and false, misleading or deceptive acts or practices by Pelletier through the Center. Upon reviewing the record, the evidence is sufficient to support these findings, thus removing appellants from any alleged exemption under the DTPA.

Finally, appellants rely on section 17.46(c) (1) which states the following:

> (c) (1) It is the intent of the legislature that in construing Subsection (a) of this section in suits brought under Section 17.47 of this subchapter the courts *to the extent possible* will be guided by Subsection (b) of this section and the interpretations give by the Federal Trade Commission and federal courts to Section 5 (a) (1) of the Federal Trade Commission Act [15 U.S.C.A. sec. 45(a) (1)].

TEX. BUS. & COM. CODE ANN. sec. 17.46(c) (1) (Vernon 1987) (emphasis added).

Appellants refer us to two federal cases to support their contentions.

Appellants direct us to *Community Blood Bank of Kansas City*

Area, Inc. v. F.T.C., 405 F.2d 1011, 1022 (8th Cir. 1969), to support their contention that since they do not operate their business for a profit, the DTPA does not apply to their activities. *Community Blood Bank* superficially supports appellants' position; the blood bank, because of its belief that commercial dealing in human blood was immoral, pursued a planned course in restraint of trade of the commercial blood banks. The opinion protects Community because it is a non-profit charitable corporation. Non-profit corporations are specifically exempted from 15 U.S.C.A. sec. 45 (West Supp. 1988). Here, the DTPA makes no such exception. It is not a question of interpretations of the federal courts being set aside, it is a matter of application of the Texas Act. *See Farmers & Merchants, Etc. v. Ferguson*,605 S.W.2d 320, 325 (Tex. Civ. App. - Fort Worth 1980, no writ).

Appellants further rely on *State of Mo. v. Nat. Organization for Women*, 620 F.2d 1301 (8th Cir. 1980). N.O.W. organized an effective economic boycott of states whose legislatures did not ratify the Equal Rights Amendment to the United States Constitution. The Eighth Circuit held that Congress did not intend for the antitrust act to apply to the political and social activities of N.O.W.*Id.* at 1302. We decline to equate the politically persuasive power of N.O.W.'s boycott with individually persuasive power of appellants' false and deceptive advertising.

Appellants are attempting to utilize certain federal cases as persuasive theories which are not within the DTPA. Congress amended the Federal Trade Commission Act, section 5 (A) (1), now 15 U.S.C.A. sec. 45(a) (1) authorizing the FTC to prohibit unfair or deceptive trade practices. However, state regulations will be supplanted only when they are inadequate or counterproductive to the commission's regulations. *American Financial Services v. F.T.C.*, 767, F.2d 957, 990 (D.C. Cir. 1985), *cert. denied*, 106 S.Ct. 1185 (1986).

We find that the DTPA applies to appellants and their activities in question. Appellants' first point of error is overruled.

By their second and third points of error, appellants allege that the DTPA as applied to appellants violates the due process clause of the

Fourteenth Amendment and Article I, sections 10 and 19 of the Texas Constitution because the DTPA is vague and overbroad. We disagree.

The overbreadth doctrine is founded on the principle that "a governmental purpose to control or prevent activities constitutionally subject to regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 307, 84 S.Ct. 1302 12 L.Ed.2d 325 (1964); *Gholson v. State*, 667 S.W.2d 168, 172 (Tex. App. - Houston [14th Dist.] 1983, pet. ref'd).

In a facial challenge to overbreadth and vagueness of a statute, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct, if it does not, then the overbreadth challenge must fail. *See Village of Hoffman Est. v. Elipside Hoffman Est.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362, (1982). The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. *Id.; Al-Omari v. State*, 673 S.W.2d 892, 897 (Tex. App. - Beaumont 1983, no writ).

In Texas courts, an overbreadth challenge is predicated on how the enactment is applied to the accused. *McDonal v. State*, 693 S.W.2d 660, 662 (Tex. App. - Dallas 1985, no writ); *Gholson*, 667 S.W.2d at 173. The record reveals that the DTPA was not applied to appellants specifically to penalize any speech or conduct protected by the First Amendment. The statute prohibits false statements or advertisements to protect the public; it does not prohibit the specific content as advertised. "Untruthful speech, commercial or otherwise, had never been protected for its own sake." *Friedman v. Rogers*, 440 U.S. 1,9,99 S.Ct. 887, 59 L.Ed.2d 100 (1978) *citing Gertz v. Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The DTPA proscribes activities constitutionally forbidden, but does not further encompass protected speech or conduct. *See Thornhill v. Alabama*, 310 U.S.88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

Turning to the allegation that the DTPA is void for vagueness, the standard rule is that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application, lacks the first essential of due process of law. *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); *Lone Star Gas Co. v. Kelly*, 140 Tex. 15, 165 S.W.2d 446, 448 (Tex. Comm.App. 1942, opinion adopted). A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed.2d 989 (1954). Greater leeway is allowed in applying the fair notice test when a court considers allegations of vagueness and indefiniteness in "regulatory statutes governing business activities." *Papachristou*, 405 U.S. at 162; *Pinnington v. Singleton*, 606 S.W.2d 682, 687 (Tex 1980). The court initially presumes the law is constitutional and places the burden upon the person attacking the law's validity to prove otherwise. *See Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983); *see also Robinson v. Hill* 507 S.W.2d 521, 524 (Tex. 1974).

The analysis of "vagueness" in cases involving regulatory statutes governing business activities is different from the approach to cases arising under the First Amendment; in the latter cases, the court is concerned with the issue of whether the statute is vague "on its face," since the vagueness may itself deter constitutionally protected conduct. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 36, 83 S.Ct. 594, 599, 9 L.Ed.2d 561 (1963); *Huett v. State*, 672 S.W.2d 533, 537 (Tex. App. - Dallas 1984, writ ref'd). A facial challenge, in this context, means a claim that the law is completely invalid, and therefore incapable of any valid application. *Steffel v. Thompson*, 415 U.S. 452 474, 94 S.Ct. 1209, 39 L.Ed. 2d 505 (1974). A facial challenge to a statute for vagueness is only appropriate upon an allegation that the law is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible

normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed. 2d 214 (1971); *Smith v. Smith*, 720 S.W.2d 586, 598 (Tex. App. - Houston [1st Dist.] 1986, no writ).

Appellants' approach to their vagueness allegation is misplaced, because the vagueness doctrine is not analyzed "as applied" to appellants. Even so, we will address the issue as to whether the DTPA is facially vague.

Section 17.46 declares "[f] alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce unlawful. TEX. BUS. & COM. CODE ANN. sec. 17.46 (a) (Vernon 1987). This is followed by subsection (b) (1-24) listing specific acts which are deceptive under the DTPA. Appellants were found guilty by a jury of violating sections 17.46(b) (1), (2), (5), and (9), which list the following acts or practices as false, misleading or deceptive:

> (1) passing off goods or services as those of another;
>
> (2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualitites which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;
>
> (9) advertising goods or services with intent not to sell them as advertised;

TEX. BUS. 7 COM. CODE ANN. sec. 17.46(b) (1), (2), (5), and (9) (Vernon 1987). Further, section 17.45 specifically defines all necessary terms which are used within the statute prohibiting specific acts.

In applying the fair notice test, we hold that the DTPA is constitutional and not impermissibly vague in all of its applications. Appellants' second and third points of error are overruled.

By their fourth point of error, appellants argue that application of the DTPA to their conduct violates their right of freedom of speech as protected by the First and Fourteenth Amendments, and by the Texas Constitution, Article I, Section 8, as against state intrusion. Appellants rely on *Federal Election Com'n v. Mass. Citizens For Life*,

Inc., 479 U.S. _____, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) to support their contention that , as a non-profit organization disseminating pro-life information, application of the DTPA to their activities violates their freedom of speech. We do not find this argument persuasive.

The obvious similarity between the *Massachusetts* case and the case at bar lies in the pro-life purpose, non-profit, non-stock corporations of both. There the similarities end. Massachusetts Citizens For Life ("MCFL") published a regular newsletter, distributed to contributors and non-contributors who expressed support for their political views. *Massachusetts*, 107 S.Ct. at 617. In preparation for upcoming primary elections, MCFL distributed a "Special Election Edition" listing some 400 candidates, but with only 13 photographs of those the group supported. *Id.* The special edition was financed from its general treasury funds. *Id.* The Court determined that section 316 of the Federal Election Campaign Act ("FECA"), pertaining to expenditures of funds from corporate treasuries being utilized on behalf of political candidates, was in violation of the First Amendment as applied to MCFL. *Id.* at 626. The court found that the restrictions should have been more narrowly tailored; finally, MCFL did not pose a threat of unfair deployment of wealth for political purposes with corporate funds, the primary infraction that the FECA wa promulgated to guard against. *Id.* at 630.

While *Massachusetts* concerns pure, classic speech, the case before us concerns speech as well as conduct. Appellants merely rely upon its non-profit status in its allegation; this is not the basis of the present law.

When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest. *Williams v. Rhodes*, 393 U.S. 23, 31, 89 S.Ct. 5, 10, 21L.Ed. 2d 24 (1968). A primary purpose of the DTPA is to provide consumers with a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common-law fraud or breach of warranty suit. *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980). A further purpose, when assessing additional damages under the DTPA, is to punish the wrongdoer for knowingly violating the Act. *Blue*

Island Inc. v. Taylor, 706 S.W. 2d 668, 670 (Tex. App. - Corpus Christi 1985, writ ref'd n.r.e.). Protecting the innocent public from those deliberately engaging in deceptive practices is a justifiable compelling state interest. The "laundry list" in section 17.46 shows how many possible ways there are to defraud the public, and the need for a rule protecting consumers. It is obvious that appellants pose a threat of the danger that prompted the regulation; advertising was intentionally, deceptively utilized to bait women into believing they would receive services from appellants. Not only did they not receive the services offered, they were deceived into giving personal information and watching films showing graphic scenes and pictures in order to emotionally force them into accepting appellants' viewpoint.

Finally, the DTPA is narrowly tailored to fit its purpose; it does not prohibit speech in any way, it merely insures that the stream of information to the public is not false. *Gertz,* 418 U.S. at 340. False and misleading representations in advertising are not shielded by the First Amendment as 'unprotected speech' such statements may be banned entirely. *Better Business Bureau, Etc. v. Medical Directors,* 681 F.2d 397,398 (5th cir. 1982). Appellants' fourth point of error is overruled.

By their fifth, sixth and seventh points of error, appellants maintain that the DTPA as applied to their conduct violates their rights of freedom of press and religion, as guaranteed by the Fourteenth Amendment and Article I, section 8 of the Texas Constitution. Appellants further contend they have an inalienable right to disseminate information. Appellants cite no authority in support of these propositions, and wholly fail to brief point of error seven; these points of error are overruled. *See State ex rel. Danner City of Watauga,* 676 S.W.2d 721, 723 (Tex. App. Fort Worth 1984, writ ref'd n.r.e.).

By their eighth point of error, appellants allege that the trial court erred in entering judgment against Pelletier because there is no evidence that the Center has not functioned as a proper corporate entity.

In determining a "no evidence" point, we are to consider only the evidence and inferences which tend to support the finding of the jury and disregard all evidence and inferences to the contrary *See Larson*

v. Cook Consultants, Inc., 690 S.W.2d 567, 568 (Tex.1985); *International Armament Corp. v. King*, 686 S.W. 2d 595, 597 (Tex. 1985); *In re King's Estate*, 150 Tex. 662 244 S.W.2d 660, 661-62 (1951). If there is any evidence of probative force to support the finding of the jury, the point must be overruled and the findings upheld. *In re King's Estate*, 244 S.W.2d at 661-62.

A "no evidence" point of error must and may only be sustained when the record discloses one of the following: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or (4) the evidence establishes conclusively the opposite of a vital fact. *Commonwealth Lloyd's Ins. Co. v. Thomas*, 678 S.W.2d 278, 288 (Tex.App. - Fort Worth 1984, writ ref'd n.r.e.); Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEXAS L. REV. 361 (1960).

In reviewing only supporting evidence, there is sufficient testimony that appellants intentionally placed deceptive advertisements in the Yellow Pages; that they utilized deceptive practices over the phone to coerce women to come to the Center; that the women would not have come to the Center had they been told the truth and not been deceived; that appellants approved and followed instructions within the manual, which was the primary basis from which appellants' business operated, on how to go about these deceptive practices. Finally, the jury found that appellants had perpetrated acts of misrepresentation and fraud. Point of error eight is overruled.

By their ninth point of error, appellants contend that the trial court erred in assessing civil penalties against Pelletier in that the jury only assessed penalties against the corporation.

The [c]ourts will not...hold individual officers, directors or stockholders liable...except where it appears that the individuals are using the corporate entity as a sham to perpetrate a fraud, to avoid personal liability, avoid the effect of a statute, or in a few other exceptional situations." *Torregrossa v. Szelc*, 603 S.W.2d 803, 804 (Tex. 1980) *citing Bell Oil & Gas v. Allied Chemical Corp.*, 431 S.W.2d336, 340

(Tex. 1968).

There is evidence that Pelletier started the business; had it incorporated under two names; placed all advertising; ordered the Pearson foundation manual and ran the business on its recommendations; was president of the corporations; participted in counseling the women who came to the Center; instructed his volunteers on how to run the Center and answered the telephones. The jury found the Pelletier controlled and dominated the Center's corporate afairs, and that a separateness of the corporate identity had ceased to exist. This testimony adequately shows that Pelletier dominated the day-to-day corporate affairs.

There is also sufficient evidence showing harm caused by Pelletier's actions. Fifteen women testified to the harm done to them by appellants' conduct, both financially and emotionally. There are in the record approximately 75 patient intake forms with information written by appellants' volunteers showing patients' anger and emotional distress at being"misled."

Finally, holding only the corporate entity liable would promote injustice. Appellant Pelletier is the sole motivator in causing the deception in question; by enabling him to avoid personal liability, he will avoid the DTPA and the legislature's intentions in promulgating the statute. He will further avoid any responsibility for illegalities perpetrated by himself while hiding behind a corporation.

We find that the jury's findings and the trial court's conclusions are legally and factually sufficient. Appellant's ninth point of error is overruled.

Appellants' final point of error argues that the trial court erred in refusing to allow visual presentation into evidence. The trial judge viewed the filmstrip and slide show and ruled, pursuant to rule 403 of Texas Rules of Civil Evidence, that the unfair prejudice outweighed the probative value of the films. The judge further stated that introduction of the films would turn the trial into a debate on abortion issues, thus leading the jury away from the issues properly before the court. The court allowed appellants to oppose the testimony of the

State's witnesses with witnesses of their own.

When exclusion of evidence is the basis for a point of error, reversal of a trial court's judgment is not justified unless an examination of the record as a whole leads to the conviction that the error in refusing to admit the testimony was calculated to cause and probably did cause the jury to give a different answer than the one it did to all issues necessary to support the judgment. *State v. Parrish,* 159, Tex. 306, 320 S.W.2d 330, 332-33 (1958); TEX R. APP. P. 81(b).

The article on evidence found in 29 AmJur.2d *Evidence* sec. 769 (1967) states:

> A certain amount of discretion as to the receipt in evidence or real or demonstrative evidence must rest in the trial court, and the court must be alert to eliminate any abuse of the principles of real or demonstrative evidence where such evidence would *give an unnecessary dramatic effect or would unduly emphasize some issues at the expense of others.*

Id. at 838 (emphasis added). This was the very reason the trial judge excluded the evidence in question. Appellants have not met their burden in showing that the exclusion of the evidence was calculated to cause and probably did cause an improper verdict.

Further, the proffered videotape was cumulative of evidence which was fully developed by the testimony of various witnesses produced at trial. Appellants had two witnesses testify as to the slide presentation and the film shown at the Center; one witness was a lay person who had previously obtained abortions, the other a previous owner of abortion clinics and present right-to-life representative. Both women testified as to the truthfulness and appropriateness of the presentations, stating that they depicted necessary and useful information. for the reasons listed above, the exclusion of such evidence is not error. *See Sinko v. City of San Antonio,* 702 S.W.2d 201, 205 (Tex.App. --San Antonio 1985, writ ref'd n.r.e.); *Bobbie Brooks, Inc. v. Goldstein,* 567 S.W.2d 902, 905 (Tex.Civ.App.--Eastland 1978, writ ref'd n.r.e.). Appellant's tenth point of error is overruled.

In considering the issues before us, we would echo Justice Jordan's opinion concerning the matters at hand:

> This opinion is not to be construed or considered in any manner as approval or sanction of appellant's camouflage tactics evidenced by the record in this case. There is no question that appellant's employees purposefully attracted pregnant women to their facility by disseminating information which could lead these women to believe that abortions were available there.

Mother and Unborn Baby Care v. Doe, 689 S.W.2d 336, 339 (Tex.App.--Fort Worth 1985, writ dism'd). The purpose of appellants' actions cannot justify an improper method of achievement. The judgment is affirmed.

/s/ HAL M. LATTIMORE
HAL M. LATTIMORE
JUSTICE

PANEL B
HILL AND LATTIMORE, JJ.
DISSENT BY BURDOCK, J.
PUBLISH
MARCH 30 1988

No. 2-86-266-CV
IN THE COURT OF APPEALS
FOR THE SECOND APPELLATE DISTRICT OF TEXAS

MOTHER AND UNBORN BABY CARE
OF NORTH TEXAS, INC, AND
CHARLES J. PELLETIER, II — Appellants

vs.

STATE OF TEXAS — Appellee

FROM THE 67TH DISTRICT COURT OF TARRANT COUNTY

DISSENT

I respectfully dissent.

The majority has improperly applied the Deceptive Trade Practices Act (DTPA) to the facts of this case. In doing so, the majority has held that any advertisement that is of questionable interpretation is a deceptive trade practice. Although I disagree with the majority's holding, I do not intend to imply that I approve of any form of fraudulent or misleading advertising.

Here, the appellants devised a way to get their pro-life messages to women who were seeking abortions. This is not the type of activity the legislature sought to protect consumers from when the DTPA was enacted.

According to the former chief of the Consumer Protection Division of the Attorney General's Office, prior to 1973, the consumer was at the mercy of unscrupulous people in the maket place:

> Debt collectors could work misery on debtors through incessant phone calls, profane language, and fraudulent misrepresentations. Landlords could interupt a tenant's utility service, bar him from his premises and wrongfully withhold his security

> deposit. door-to-door salesmen could pressure people into purchasing expensive items they neither needed nor wanted and sellers, generally, could grossly exaggerate the value of their goods and services. This conduct was not necessarily lawful; much of it was not. The problem was that the remedies for such abuse were so woefully inadequate as to render virtually meaningless what rights a consumer did have. Even if an individual set of facts met the requirements for the cause of action, the time and cost of litigation when contrasted with the generally small recovery potential caused most consumers to simply 'grin and bear it,' leaving the wrongdoers to continue business as usual.

Philip K. Maxwell, *Public and Private Rights and Remedies Under The Deceptive Trade Practices--Consumer Protection Act.* 8 St. Mary's Law journal. 617, 618 (1976-77).

The fact that the women met the definition of a consumer is not alone sufficient to imply coverage of the DTPA. In my review of the record, no one was acturally offered an abortion. Further, my research of the DTPA leads me to velieve that the underlying transaction must be commercial for the DTPA to apply. Here, the underlying transaction was moral in nature, not commercial. As I have discovered no authority which I believe would properly bring the facts of this case under the auspices of the DTPA, I would reverse the judgment of the trial court and render judgment for the appellants.

/s/ WILLIAM E. BURDOCK
WILLIAM E. BURDOCK
JUSTICE

PUBLISH
MARCH 30 1989

NO. 2-86-266-CV
IN THE COURT OF APPEALS
FOR THE SECOND APPELLATE DISTRICT OF TEXAS

MOTHER & UNBORN BABY CARE OF NORTH TEXAS, INC., & CHARLES J. PELLETIER, II	From the 67th District Court Tarrant County (67-99153-86) March 30, 1988
vs.	Opinion by Justice Lattimore Dissent by Justice Burdock
THE STATE OF TEXAS	(P)

JUDGMENT

This cause came on to be heard on the transcript of the record and the same having been reviewed it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that appellants, Mother & Unborn Baby Care of North Texas, Inc., and Charles J. Pelletier, II, pay all costs in this behalf expended, and that said costs be paid out of the deposits for costs made with the clerk of the trial court, for which let execution issue, and that this decision be certified below for observance.

/s/ HAL M. LATTIMORE
HAL M. LATTIMORE
JUSTICE

IN THE COURT OF APPEALS
FOR THE SECOND APPELLATE DISTRICT OF TEXAS

MOTHER & UNBORN BABY CARE OF NORTH TEXAS, INC., & CHARLES J. PELLETIER, II	)	CASE NO. 2-86-266-CV
vs.	)	
THE STATE OF TEXAS	)	

ORDER

On this day the Court considered the motion for rehearing of appellants, Mother and Unborn Baby Care of North Texas, Inc. and Charles J. Pelletier, II.

It is the opinion of the Court that said motion for rehearing should be and is hereby **overruled.** It is the order of this Court that the opinion and judgment of March 30, 1988 stand unchanged.

The Clerk of this court is directed to transmit a copy of this Order to the attorneys of record.

It is so ordered.

SIGNED THIS 11th day of May, 1988.

/s/ HAL M. LATTIMORE
HAL M. LATTIMORE
JUSTICE

EN BANC
BURDOCK, J. WOULD GRANT

OVRULE.CV

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

November 16, 1988

Mr. J. Shelby Sharpe
Law Offices of J. Shelby Sharpe
2401 Texas American Bank Bldg.
Fort Worth TX 76102

Mr. Richard L. Griffith
Cantey and Hanger
2100 First RepublicBank Tower
801 Cherry Street
Fort Worth TX 76102

Mr. Stephen Gardner
Office of the Attorney General of Texas
Consumer Protection Division
714 Jackson, Suite 700
Dallas TX 75202

Mr. Eliot D. Shavin
Office of the Attorney General of Texas
Consumer Protection
714 Jackson, Suite 700
Dallas TX 75202

RE: Case No. C-7600

STYLE: MOTHER AND UNBORN BABY CARE OF NORTH TEXAS, INC., ET AL. v. THE STATE OF TEXAS

Dear Counsel:

Today, the Supreme court of Texas denied the above referenced application for writ of error with the notation, Writ Denied.

Respectfully yours,
Mary M. Wakefield, Clerk

By /s/ Blanca E. Morin
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

Mr. J. Shelby Sharpe
Law Offices of J. Shelby Sharpe
2401 Texas American Bank Bldg.
Fort Worth TX 76102

January 4, 1989

Mr. Richard L. Griffith
Cantey and Hanger
2100 First RepublicBank Tower
801 Cherry Street
Fort Worth TX 76102

Mr. Stephen Gardner
Office of the Attorney General of Texas
Consumer Protection Division
714 Jackson, Suite 700
Dallas TX 75202

RE: Case No.1 c-7600

STYLE: MOTHER AND UNBORN BABY CARE OF NORTH TEXAS, INC, ET AL. v. THE STATE OF TEXAS

Dear Counsel:

Today, the Supreme Court of Texas overruled peitioner's motion for rehearing of the application for writ of error, as supplemented, in the above styled case.

Respectfully yours,
Mary M. Wakefield, Clerk

By /s/ Blanca E. Morin

Deputy